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Issue Date: 24 May 2007

CASE NO.: 2005-LHC-00213

OWCP NO.: 15-046785

In the matter of:

J.H.,

Claimant,

vs.

BLACKWATER SECURITY CONSULTING, LLC,

Employer,

and

**INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG
WORLDSOURCE,**

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party In Interest.

SUPPLEMENTAL ORDER ON REMAND
GRANTING SPECIAL FUND RELIEF

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* ("the Act"), as extended by the Defense Base Act, 42 U.S.C. § 1651, *et seq.*, and the regulations promulgated thereunder. On October 24, 2005, I issued a compensation order ("my prior Decision") approving stipulations and denying subsection 8(f) relief to Employer Blackwater Security Consulting and Carrier Insurance Co. of the State of Pennsylvania (collectively "Employer"). The parties appealed my prior Decision to the Benefits Review Board ("BRB"). The BRB issued its non-published decision and order dated September 28, 2006, affirming my prior Decision in all respects except for my denial of subsection 8(f) relief. Consequently, the BRB vacated my denial of subsection 8(f) relief and remanded the case to me for further consideration.

This supplemental order is limited to the issue of Employer's entitlement to subsection 8(f) relief. Employer and the Director, Office of Workers Compensation Programs (the "Director") as represented by the Office of the Solicitor, are the parties to this dispute.

Employer submitted exhibits (“EX”) 1-10, with EX 9 being the June 3, 2005 deposition of independent medical examiner (“IME”) Peter A. von Rogov, M.D. and EX 10 being the June 6, 2005 deposition of vocational rehabilitation expert John C. Drew, M.A., C.R.C. These exhibits were previously admitted into evidence. On August 1, 2005, Employer’s counsel submitted its post-trial brief, which I have marked and admitted into evidence as Administrative Law Judge exhibit (“ALJX”) 1. That same day, the Director submitted his post-hearing brief, which I have marked and admitted into evidence as ALJX 2, thereby closing the record.

Stipulations

The stipulations entered into by Claimant and Employer are contained in EX 6. In my prior Decision, I approved the following stipulations, having found that there is substantial evidence supporting them: (1) Claimant J.H. (“Claimant”), who was born on March 18, 1970, was employed as an armed security specialist by Employer in Pakistan pursuant to a contract for security services between Employer and the U.S. Government; (2) while riding as a passenger in a vehicle traveling over a rough road, Claimant was thrown against the roof of the vehicle when the vehicle hit a bump or hole in the road; (3) on or about March 21, 2003, Claimant, acting within the scope of his employment, injured his back; (4) this injury comes within the coverage of the Act, as extended by the Defense Base Act, and Employer’s liability under said Act was provided by Insurance Company of the State of Pennsylvania through its claims administrator AIG WorldSource; (5) timely notice of injury and timely claim for compensation were given and filed in accordance with section 12 and section 13 of the Act; (6) Claimant’s average weekly wage at the time of injury was \$1,400; (7) Claimant has a retained wage earning capacity of \$500; and (8) Claimant reached maximum medical improvement with regard to his low back injury on October 20, 2003. *See* EX 6; EX 1-10; ALJX 1.

Further Findings of Fact

In October 2001, Claimant injured his back and suffered a large disc herniation. EX 7 at 2. On December 20, 2001, Dr. George Lien, a neurosurgeon, performed a right L5-S1 microdiscectomy. EX 8 at 99-100. At a follow up examination on January 22, 2002, Claimant reported to Dr. Lien that he no longer had leg or back pain or any other symptoms after the 2001 surgery. *Id.* at 98.

Claimant subsequently obtained a job with Employer as an Armed Security Specialist and in February 2003, commenced working in Pakistan pursuant to a contract between Employer and the U.S. Department of Defense. EX 1 at 4. On or about March 21, 2003, Claimant injured his back while sitting in a personnel carrier when the vehicle struck a bump or hole in the road, causing him to hit his head against the roof. EX 7 at 10. Claimant was “out for a few seconds,” and was treated by medical personnel. EX 7 at 69. In early April 2003, Claimant left Pakistan and returned to his home in Shelbyville, Tennessee.

On April 15, 2003, Dr. Lien treated Claimant for low back pain and left leg paresthesias. EX 1 at 4; EX 8 at 97. Claimant underwent an MRI, which revealed disc desiccation and loss of disc height at the L5-S1 level. EX 8 at 94. He received epidural steroid injections, pain

medication, and physical therapy, and never returned to work. *See* EX 1 at 4-5; EX 7 at 79-80; EX 8 at 84-93. Dr. Lien diagnosed lumbar radiculopathy. EX 7 at 79-80; EX 8 at 84, 86-96. Dr. Lien also assigned permanent work limitations of lifting 40 pounds occasionally and 20 pounds frequently. EX 8 at 84. The doctor opined that Claimant had a permanent partial impairment of 13% of the whole person based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition. *Id.* Claimant reached maximum medical improvement on October 20, 2003. *See* EX 6 at 67 (Stip. Fact No. 8).

On December 9, 2003, submitted Defendant's Application for § 8(f) Relief. EX 1. Employer offers the opinions of Dr. Peter von Rogov, an orthopedic surgeon, and Mr. John Drew, a vocational rehabilitation expert, in support of its entitlement to Special Fund relief

On July 9, 2004, Dr. von Rogov examined Claimant and prepared his IME report dated July 18, 2004. EX 7 at 69-83. At his deposition taken on dated June 3, 2005, Dr. von Rogov stated that an individual who had had a microdiscectomy, as did Claimant following his 2001 back injury, would not be as structurally sound as one who still had a "healthy disk" in that place, due to the loss of shock-absorbing and motion capability. EX 9 at 10-11. Dr. von Rogov went on to say that he would advise a patient after such a surgery to avoid frequent bending or stooping, frequent lifting over 50 pounds, occasional lifting over 75 pounds from floor to shoulder, frequent lifting over shoulder level, or twisting of the trunk. EX 9 at 11.

In his IME report of July 18, 2004, Dr. von Rogov diagnosed Claimant with (1) cervical spine sprain, (2) low back sprain superimposed upon right L5-S1 microdiscectomy, and (3) compression fracture T12, minimal. EX 7 at 82. Dr. von Rogov also wrote:

I estimate that [considering his post-2003 injury lifting restrictions, Claimant] has lost approximately 50% of his pre-injury capacity lift [*sic*] and lost approximately 50% of his pre-injury capacity to bend or stoop [Claimant's] pre-existing pathology including the lumbar surgery of December 20, 2001, caused [his] current disability to be materially and substantially greater than that which resulted from the March 21, 2003 injury alone. In my opinion . . . [Claimant] had an 8% Impairment of the Whole Person. Following the injury of March 21, 2003, [he] had a 10% Impairment of the Whole Person, in addition to the compression fracture of T-12, which . . . equates to an additional 2% Impairment of the Whole Person. This (10% + 2%) adds up to a 12% Whole Person Impairment. The additional 4% Whole Person Impairment is a result of the March 21, 2003 injury.

EX 7 at 82-83 (emphasis in original).

Dr. von Rogov testified at his deposition that in his opinion, Claimant's condition was probably 30 to 40 percent worse as a result of his second back injury in March 2003 than it was immediately after his first back injury in 2001. EX 9 at 13-14. In addition, Dr. von Rogov indicated that Claimant had an 8% impairment after the 2001 surgery. However, he developed a post-surgical radiculopathy, which raised his impairment by 2%, and had an additional compression fracture of a thoracic vertebral body, which added another 2%, leaving Claimant with a current 12 % whole-person impairment. EX 9 at 15-17.

The Vocational Evidence

Employer's vocational rehabilitation expert, John Drew, prepared a vocational evaluation report and labor market survey dated February 25, 2004. EX 4. He also prepared an addendum to his vocational evaluation report dated March 15, 2004. EX 5. Mr. Drew obtained a master's degree in education guidance and counseling from the University of Colorado in 1986, and has been a vocational rehabilitation counselor for over 25 years. He is a certified rehabilitation counselor and a Diplomate of the American Board of Disability Analysts. EX 10 at 6-7.

At his deposition taken on June 6, 2005, Mr. Drew testified that he found Claimant to be a professional, highly-skilled instructor, advisor and trainer in law enforcement and security with many specializations like weapons, tactics, intelligence, counter-intelligence, explosives, surveillance, and homeland security. EX 10 at 9. In his report of February 25, 2004, Mr. Drew concluded that although Claimant is unable to return to his position in Pakistan due to its physically demanding nature, he remains employable in the local, national, and international labor markets. EX 4 at 50-51; EX 5 at 53-64.

Mr. Drew found an array of employment opportunities in a number of different fields for which Claimant appears to be qualified. Mr. Drew had a difficult time estimating Claimant's annual salary at his former job with Employer, since he worked an irregular schedule of 90 to 120 days on and 30 days off. EX 4 at 50. However, he calculated that Claimant earned approximately \$107,700 per year when he worked for Employer. EX 4 at 50. Mr. Drew also commented that Claimant would earn an annual salary of \$104,000 if he worked a more typical, full-time, 2080 work hours per year, at the higher deployment rate of \$400 per day. *Id.*

In his vocational evaluation and labor market survey dated February 25, 2004, Mr. Drew surveyed the labor markets in Shelbyville, Tennessee and Nashville, Tennessee (58.1 miles from Shelbyville), as well as the national and international labor markets. EX 4. He also made recommendations concerning Claimant's employability and his wage-earning capacity. Mr. Drew concluded that Claimant would incur: wage loss if he pursues an "average paying job position in his local labor market or in the U.S. national labor market;" "less wage loss, or possibly no wage loss nor loss of future earning capacity" if he obtains a commission sales job; and "little to no wage loss, nor loss to earning capacity" if he obtains a position with the U.S. Army or Department of Defense or one of the "more highly skilled, professional jobs in Intelligence and Homeland Security in the national market In fact, he may, in time, receive even a greater salary in one of these jobs than at [Employer]." *Id.* at 31.

In a supplement to his February 2004 report dated March 15, 2004, Mr. Drew listed the "very best, suitable jobs" for Claimant. EX 5 at 53. Mr. Drew indicated a wide salary range existed when comparing the local, national and international labor markets as well as within each of those markets. EX 5 at 64. Specifically, he noted average ranges of: \$30,000-\$50,000 in the local Tennessee area; \$50,000-\$70,000 in the national public sector; \$47,110-\$144,600 in the National U.S. market; and \$30,000-\$186,144 in the international market. *Id.*

Mr. Drew also testified at his deposition about the extent of Claimant's disability following the 2001 and 2003 injuries. *See* EX 10. Specifically, Mr. Drew testified that before Claimant's first injury in 2001, he had "access to the full realm of all jobs in law enforcement and security, [including] heavier physical jobs like patrolman, armed officer, [and] homicide detective" EX 10 at 14-15. Mr. Drew said that after the back injury in 2001, Claimant was limited to performing medium level jobs requiring exertion of 20 to 50 pounds of force occasionally and/or 10 to 25 pounds of force frequently to lift or move objects. EX 10 at 19. According to Mr. Drew, Claimant "already had a vocational loss or loss of access to jobs following the 2001 injury and surgery but before the 2003 injury It was increased or he had more of a vocational loss following the 2003 injury." EX 10 at 16.

Mr. Drew went on to explain that Claimant had access to more medium level jobs after the 2001 injury than he did after the 2003 injury. EX 10 at 17-18. Mr. Drew opined that "There certainly are more jobs that [Claimant] could have had access to that required lifting of up to 75 pounds than after the 2003 injury which put him at 50 pounds maximum. He could have done jobs that required more bending and stooping, those probably being the security type jobs, mostly security, law enforcement. He would have access to some armed positions, if they didn't require apprehending criminals, and search-and-rescue activities" and similar positions. EX 10 at 17-18. Mr. Drew testified that after his second back injury in 2003, Claimant was further limited to positions involving sedentary to light levels of exertion. EX 10 at 19. Those positions include advisor, trainer, private investigator, surveillance, and the like. EX 5 at 53-64; EX 10 at 14-15.

Discussion

A. The Requirements for Special Fund Relief

In order to obtain Special Fund relief under subsection 8(f), Employer must show that: (1) Claimant had an existing permanent partial disability prior to his work-related injury; (2) the pre-existing disability was manifest to Employer prior to the work-related injury; and (3) the pre-existing disability contributed to Claimant's ultimate permanent disability in the specific manner prescribed in the Act. *See Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). The Director concedes, and I found in my prior Decision, that Claimant's pre-existing back condition for which he underwent a microdiscectomy on December 20, 2001 constitutes a pre-existing permanent partial disability which was manifest to Employer. Accordingly, the first two requirements for subsection 8(f) relief are satisfied. For the reasons set forth below, I find that Employer has also met the third, or "contribution," requirement and is therefore entitled to Special Fund relief.

B. Employer Has Satisfied the Contribution Requirement for Subsection 8(f) Relief With Medical Evidence

In brief, the third requirement for obtaining subsection 8(f) relief has two elements. First, it must be shown that the claimant's ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is partial or total. *See* 20 C.F.R. 702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the

work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. *See* 20 C.F.R. 702.321(a)(1).

In an effort to show that these requirements have been satisfied, Employer has cited the medical reports of Dr. von Rogov and Dr. Lien. I find that this evidence is more than sufficient to show that the foregoing elements of the contribution requirement have been met. I therefore find that Employer is entitled to relief under subsection 8(f) of the Act.

At his deposition on June 3, 2005, Dr. von Rogov stated that an individual who has had a microdiscectomy, as did Claimant following his 2001 back injury, would not be as structurally sound as one who still had a "healthy disk" in that place, due to the loss of shock-absorbing and motion capability. EX 9 at 10-11. After conducting a thorough review of Claimant's medical records and performing a physical examination, Dr. von Rogov opined that Claimant had a pre-existing ratable whole person impairment of 8% due to his 2001 back injury and surgery. EX 7 at 82-83. Dr. von Rogov further opined that Claimant sustained ratable disability of 4% as a result of the subsequent 2003 employment injury alone, which combined with the pre-existing 8% impairment to produce an overall 12% impairment. EX 7 at 81-83; EX 9 at 13-17. I credit Dr. von Rogov's opinion as it is consistent with the medical opinion of Claimant's treating physician, Dr. Lien, who opined in 2003 after Claimant's second back injury that Claimant's overall disability was 13% of the whole person. EX 8 at 84. I find that this evidence is sufficient to establish that Claimant's ultimate disability is not due solely to the most recent injury in 2003. I further find that the medical evidence establishes that as a result of the combination of Claimant's pre-existing back condition and his work-related back injury in 2003, Claimant's current overall disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone.

C. Employer Has Also Satisfied the Contribution Requirement for Subsection 8(f) Relief With Vocational Evidence

In another attempt to show that the contribution requirement has been satisfied in this case, Employer also presented the deposition testimony of Mr. Drew, a vocational expert. Mr. Drew testified that based on Claimant's professional education and experience and absent a pre-existing lumbar disc condition, a wide range of law enforcement jobs would be available to him including patrolman, armed officer, and homicide detective. EX 10 at 14-15. In addition, Mr. Drew further testified that, even with some prophylactic restrictions on account of Claimant's post-surgical back condition placing him in the medium duty work level after 2001, Claimant would have had access to such jobs as unarmed security and surveillance work. EX 10 at 14-19. Following Claimant's March 2003 employment injury, however, his medical restrictions increased to preclude all but light duty and sedentary jobs in the field of law enforcement such as advisor, trainer, or administrator. EX 5 at 53-64; EX 10 at 14-15. I find that this evidence is

sufficient to show that all elements of the contribution requirement have been satisfied and therefore conclude that Employer is entitled to subsection 8(f) relief.

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that my prior Decision be amended as follows:

1. Employer shall pay to Claimant permanent partial disability benefits, calculated as two-thirds of Claimant's average weekly wage of \$1,400 less his post-injury earning capacity of \$500 per week for a compensation rate of \$600 per week, from October 20, 2003 and ending 104 weeks thereafter, plus annual increases pursuant to subsection 8(f) of the Act.
2. Beginning 104 weeks from October 20, 2003 and until ordered otherwise, the Special Fund shall pay the Claimant permanent partial disability compensation at a weekly compensation rate of \$600.00, plus annual increases pursuant to subsection 8(f) of the Act.
3. Employer shall receive a credit for previous disability benefits paid to Claimant.
4. Employer and the Special Fund shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. § 1961.
5. The District Director shall make all calculations necessary to carry out this order.
6. The remaining portions of my prior Decision are unchanged by this supplemental order except as referenced above.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California